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STATE OF MICHIGAN

IN THE SUPREME COURT

ROGER MANN,

Plaintiff-Appellee,

vs.

SHUSTERIC ENTERPRISES, INC., d/b/a/ SPEEDBOAT BAR & GRILL, a Michigan corporation,

Defendant-Appellant,

and

BADGER MUTUAL INSURANCE COMPANY, a Wisconsin Insurance Company,

Defendant, Not Participating.

/

Supreme Court Docket No. 120651

Court of Appeals Docket No. 210920

Wayne County Circuit Court No. 96-618088-NO
HON. SHARON TEVIS FINCH

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BRIEF ON APPEAL OF DEFENDANT-APPELLANT SHUSTERIC ENTERPRISES, INC. D/B/A SPEEDBOAT BAR & GRILL

APPENDIX ON APPEAL

PROOF OF SERVICE

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JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

STATEMENT OF QUESTIONS PRESENTED

I. IT IS TIME FOR THE MICHIGAN SUPREME COURT TO OVERRULE MANUEL V. WEITZMAN, 386 MICH 157 (1971), WHICH CREATED A PREMISES LIABILITY EXCEPTION TO DRAMSHOP EXCLUSIVITY IN ALCOHOL-RELATED CASES. IN LIGHT OF THE 1986 PASSAGE OF FORMER MCLA 436.22(11) AND MCLA 436.22(10) MAKING THE DRAMSHOP ACT AT ONCE EXCLUSIVE, AS WELL AS TO PRECLUDE ANY RECOVERY BY THE ALLEGED INTOXICATED PARTY AS A MATTER OF LAW AND AS A MATTER OF LEGISLATIVE POLICY, DOES THE MANUEL RULE HAVE ANY CONTINUING VITALITY IF THE PREMISES CLAIM IS ALCOHOL-RELATED AND IS, AT BOTTOM, A TRUE DRAMSHOP CASE, EVEN WITH STRATEGICALLY CHOSEN NOMENCLATURE TO ALLOW THE A.I.P. TO RECOVER?

Plaintiff-Appellee would say, "Yes".

Defendant-Appellant would say, "No".

The Court of Appeals agreed with Plaintiff.

The Trial Court agreed with Plaintiff.

II. IN ICE AND SNOW SLIP AND FALL CASES, SJI2d 19.03 AND 19.05 ARE INHERENTLY INCONSISTENT. PLAINTIFF HERE ADMITTED THAT HE KNEW ALL ABOUT THE BLIZZARD CONDITIONS ON THE DAY OF THE ACCIDENT AND WAS AWARE OF ALL THE PRECAUTIONS THAT HE HAD TO TAKE. DOES SUCH "OPEN AND OBVIOUS" CONDITIONS RENDER PARALLEL USE OF MUTUALLY EXCLUSIVE SJI2d 19.03 AND 19.05 ERROR?

Plaintiff-Appellee would say, "No".

Defendant-Appellant would say, "Yes".

The Court of Appeals agreed with Plaintiff.

The Trial Court agreed with Plaintiff.

III. THE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE VOLUNTARY INTOXICATION OF PLAINTIFF WAS WHOLLY AUTHORIZED BY SJI2d 13.02. THE TRIAL COURT'S USE OF SJI2d 13.02 AND 19.03 WAS INHERENTLY INCONSISTENT WITH THE ALLEGED FAILURE TO WARN THESIS PRESENTED BY SJI2d 19.03. THE USE OF SJI2d 19.03 EFFECTIVELY NEGATED FORMER MCLA 436.22(10) WHICH MAKES A DRAMSHOP ACT CASE THE EXCLUSIVE REMEDY FOR MONEY DAMAGES AGAINST A TAVERN. GIVEN THIS INCONSISTENCY IN THE JURY INSTRUCTIONS, A NEW TRIAL MUST BE ORDERED.

Plaintiff-Appellee would say, "No".

Defendant-Appellant would say, "Yes".

The Supreme Court directed the parties to brief this issue.

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CONCISE STATEMENT OF FACTS AND PROCEEDINGS

Plaintiff, Roger Mann, arrived at the Speedboat Bar & Grill, a popular and historic tavern located on the water in Wyandotte, Michigan, at about 4:00 p.m., on March 6, 1996. (103a; 106a). With his companions, Mr. Mann thereafter allegedly began to consume a large number of alcoholic drinks for the next several hours (126a); it was not disputed but that Mann was drinking rather heavily at that time as everyone bought rounds of drinks (123a-126a). Plaintiff admitted having five (5) or six (6) drinks of "doubles" of Royal Canadian Whiskey [ten shots] **and** two (2) or three (3) beers; 123a; 124a; 125a. While Plaintiff and his companions were in the tavern purportedly drinking for several hours, a severe snow storm commenced on that March day, flying with familiar Michigan fury, creating blizzard conditions; Mr. Mann knew it was a blizzard (107a). Plaintiff admitted he felt the effects of the alcohol (113a). All of the patrons in the bar could see at first glance that it was heavily snowing through the big Speedboat Bar & Grill picture window which granted wide, outside views to the Speedboat Bar patrons. (106a).

He finally concluded that he had ten (10) to twelve (12) shots of whiskey "chased" by the beers in a three (3) hour period of time. (126a). Plaintiff knew fully well that the weather had turned bad as he could see the stormy outside weather conditions by simply looking out of the big picture window of the bar. (106a). Since Plaintiff had lived in Michigan all of his life

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(107a - 108a), he knew that winter storms might take place in March in Michigan; Plaintiff did not dispute that he knew that ice and snow was on the ground due to blizzard conditions and that the weather was "bad out" on the afternoon he spent in the Speedboat. (106a - 109a). Everyone in the bar, including Plaintiff, knew that it was snowing and sleeting outside the Speedboat; no one had to warn him. (108a). It was obvious to all the customers that the conditions outdoors were slippery. (108a). While Plaintiff denied that he was drunk (109a - 110a), he knew that he had to take precautions because the conditions outdoors were slippery. (103a - 108a). In fact, Plaintiff had fallen and was seriously injured in 1992 in a winter accident which had taken place several years before. (107a).

Plaintiff regarded himself as of average intelligence and so no one had to warn him about taking precautions during a winter storm; he had long lived in Michigan and had known about that purported danger of falling on ice and snow all of his life. (108a). Mr. Mann agreed it was a blizzard out (109a). Plaintiff knew the weather conditions were bad in the Speedboat parking lot because when he opened the door to the outside, he saw the snow-covered and icy parking area and knew what precautions to take. (116a). He knew it had been snowing and sleeting out all afternoon that day. (116a).

Plaintiff knew that he had to take precautions against falling when it was snowing heavily outside as he had the

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experience, working out of doors as Mann had done as a laborer for over thirty-eight (38) years, to know to be careful during such bad weather. (116a).

After his alleged drinking bout of six (6) "double" whiskeys and three (3) beers (75a - 76a), Plaintiff admitted that he had a "pretty good glow" on (109a), was feeling the intoxicating effects of the alcohol (113a); Mann nevertheless contended that, while he was not falling down drunk, he admitted he was in a "good mood" after ingesting that much alcohol to drink. (114a). When he decided to leave, Mann wisely decided not to drive but to go home with a companion, letting his friend do the driving. (109a, 124a).

Having previously held that this would be regarded as a premises liability case, not subject to Dramshop Act requirements (50a-56a), the Trial Court also repeated in its mid-trial ruling that this was **not** a Dramshop case at (50a - 56a; 182a - 186a).

Plaintiff's Counsel nevertheless treated the case throughout trial as a Dramshop case as he claimed that Mann must have been "visibly intoxicated" from testimony of his expert, Dr. Schneider, (128a - 171a).

To effectuate this strategy, Plaintiff presented an expert, Dr. Schneider, who concluded that, after Mann's alleged voluntarily ingesting of so much alcohol, it was highly improbable that Roger Mann could "mask" the degree of his [visible] intoxication. (162a). Thus, did Plaintiff Mann claim

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that he was "visibly intoxicated" to assist him in his "premises liability" case, even if while he also claimed at the same time not to be bound by the Dramshop Act's exclusivity and nonliability provisions.

For his part, the Plaintiff admitted that his alleged intoxication "added" to the chances that he was going to fall down (81a). As Mr. Mann opened the door to leave, he conceded that he knew that the Speedboat Bar parking lot had to be covered with snow and ice from the blizzard. (81a; 176a - 177a). No one had to tell Plaintiff what precautions to take to walk on this snow and ice as Mr. Mann already knew what safe actions he should take. (116a).

During the course of the trial, the Trial Court had decided to utilize **both** SJI2d 19.03 and SJI2d 19.05 in the then-applicable Standard Jury Charges[1], notwithstanding the clearly worded Note on Use to SJI2d 19.05 making that Standard Jury Instruction the jury charge predominant in legal effect for snow and ice premises liability cases; Judge Finch held, in legal effect, however, that this was a premises liability claim and would **not** be regarded as a Dramshop Act action. These two (2) inconsistent charges [SJI2d. 19.03 and 19.05] were given over defense objection, registered at (51a - 56a). Nevertheless, **both** instructions, SJI2d 19.03 and SJI2d 19.05, were contemporaneously

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[1] Now encapsulated at M Civ JI 19.03 and 19.05. The text of SJI2d 19.03 and 19.05 is found in our Appendix at 179a and 181a.

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given, notwithstanding the plainly-worded Note on Use to SJI2d. 19.05 which ordains that, in legal effect, premises liability for alleged negligence arising out of snow and ice accumulations should be governed primarily by SJI2d 19.05. In ruling on those instructions and in rejecting defense objections, Judge Sharon Tevis Finch expressed her anxiety that the Plaintiff would not prevail if this case were regarded as a pure Dramshop claim, (53a).[2]

During the trial, the Trial Court insisted upon giving the SJI2d 19.03 instruction, particularly with respect to the component of the "duty to warn" of the dangers of a snowy parking lot, notwithstanding Plaintiff's undisputed, previous knowledge of the storm and the dangers as well as the precautions to be taken in these areas; Judge Finch ruled that this duplication of the two (2) SJI2d 19.03/19.05 Instructions was appropriate in light of Plaintiff's degree of alleged intoxication which affected Plaintiff's ability to apprehend the danger, and, even more importantly, this purported inebriation would have increased Defendant's obligations to warn the allegedly voluntarily intoxicated person of already observed weather and of potentially dangerous conditions already known; because of Plaintiff's

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[2] This comment by Judge Finch was made, certainly, in recognition that the Dramshop Act is regarded as an exclusive remedy under then-applicable MCLA 436.22(11) and, in any event, the Plaintiff who is the Alleged Intoxicated Person under that exclusively controlling enactment has no cause of action whatsoever because that party is not "innocent" as defined by the statute and is definitionally precluded from all Dramshop-related claims. See then-applicable MCLA 436.22(10).

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claimed, heavy, voluntary ingestion of alcohol, the jury could determine that the snowy conditions were not "open and obvious" in light of excusing Plaintiff's undisputed knowledge due to Plaintiff's purported diminished capacity due to inebriation, Judge Finch ruled and charged[3]. See (51a - 56a; 182a - 186a; 172a). The Court of Appeals apparently accepted this rationale.[4] (20a) and (35a)

On May 11, 2001, the Michigan Court of Appeals Panel consisting of Judge Michael Kelly, Helene White and Kurtis Wilder, originally ruled against Defendant on all grounds. This Opinion is found in our Appendix at 20a. A timely Rehearing Motion was filed by Defendant on May 31, 2001 and, pursuant thereto, the Panel recognized in its November 30, 2001 Opinion that its ruling on Cross Appeal in favor of Plaintiff with respect to allowing additur had been ill-advised in light of Kelly v Builders Square, 465 Mich 29, 632 NW2d 912 (2001) which had been very recently decided by our Supreme Court in the interim while the Rehearing was pending in the Michigan Court of Appeals. This later Opinion is found in our Appendix at (35a). All other original holdings now appealed from were left intact, thereby creating this appeal (35a).

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[3] In addition, SJI2d 13.02 on voluntary intoxication was given at the trial over Plaintiff's objection. The text of SJI2d 13.02 is found in our Appendix at 178a.

[4] The first Court of Appeals' Opinion is that cited in the Brief to reduce unnecessary and redundant citations.

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Following the November 30, 2001 reaffirmation of most of the issues against Defendant in a second Opinion of said date (35a), an Application for Leave to Appeal was filed. This Application was granted on December 11, 2002. (1a). The within Full Calendar Brief on Appeal contemplated by the Michigan Supreme Court now follows.

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ARGUMENT

I.

IT IS TIME FOR THE MICHIGAN SUPREME COURT TO OVERRULE MANUEL V. WEITZMAN, 386 MICH 157 (1971), WHICH CREATED A PREMISES LIABILITY EXCEPTION TO DRAMSHOP EXCLUSIVITY IN ALCOHOL-RELATED CASES. IN LIGHT OF THE 1986 PASSAGE OF MCLA 436.22(11) AND MCLA 436.22(10) MAKING THE DRAMSHOP ACT, AT ONCE EXCLUSIVE, AS WELL AS TO PRECLUDE ANY RECOVERY BY THE ALLEGED INTOXICATED PARTY AS A MATTER OF LAW AND AS A MATTER OF LEGISLATIVE POLICY, THE MANUEL RULE DOES NOT HAVE ANY CONTINUING VITALITY IF THE PREMISES CLAIM IS ALCOHOL-RELATED AND IS REALLY, AT BOTTOM, A TRUE DRAMSHOP CASE EVEN WITH STRATEGICALLY CHOSEN NOMENCLATURE TO ALLOW THE A.I.P. TO RECOVER.

The Court of Appeals below utilized the case of Manuel v Weitzman, 386 Mich 157, 191 NW2d 474 (1971) to avoid the exclusivity of the Dramshop Act. (23a and 38a)[5]. Having admittedly ingested prodigious amounts of alcohol, Roger Mann cannot possibly be regarded as an "innocent party" under former MCLA 436.22(10) when the case is, in true reality, a "Dramshop" action, which is exclusively governed by that law, under former MCLA 436.22(11).[6] The purported serving of alcohol is, in all relevant legal respects, at central issue in this transmogrified premises liability case. When the sale of alcohol relates to the Alleged Intoxicated Person ("A.I.P.") himself or herself, can a "premises liability" case be used to creatively avoid the dictates of the Legislature for Dramshop cases by utilizing

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[5] To reduce duplication, only the first Court of Appeals' Opinion will be referenced as to these issues.

[6] Now found at MCLA 436.1801(10) and MCLA 436.1801(9), respectfully.

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intoxication when convenient and rejecting it when inconvenient? That is what is at issue here.

Judge Sharon Tevis Finch and Court of Appeals Judges Michael Kelly, Helene White and Kurtis Wilder all said below that Plaintiff's linguistic subterfuge was an effective circumvention around the statute. We strongly disagree.

When reference is had to Manuel v Weitzman, 386 Mich 157, 191 NW2d 474 (1971), as was done by the Court of Appeals at 28a and 38a, it should be contrasted to the 1986 Tort Reform Legislation under former MCLA 436.22(11) making the Dramshop remedy the exclusive remedy for the illegal sale, furnishing or giving of intoxicants. These two (2) legal authorities, Manuel and former MCLA 436.22(11), are at odds; something has to give. Legislative Policy was declared by then-applicable MCLA 436.22(11)[7], making the Act the exclusive remedy for alcohol-related torts against the bars. It is now legally clear that no party who has ingested alcohol can be regarded as "innocent" to make a recovery under the Act as the A.I.P. has no claim at all as a matter of law. See former MCLA 436.22(10)[8]. What is a far more nettlesome legal point is what can be termed as a "premises" case, as opposed to a "pure" Dramshop Act action relating to claims against taverns. This is an opportunity for the Supreme Court to cut through that legal Gordian Knot by putting Manuel

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[7] Now found in MCLA 436.1801(10).

[8] Now MCLA 436.1801(9).

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into not-so-deserved retirement.

The Legislative Tort Reform clarifications accomplished for the Dramshop Act in 1986 and those which have been added later have lately been blurred by Bench and Bar by over-reliance on Manuel v Weitzman, supra. Manuel was a case decided over thirty years ago, years long before the relevant spate of Tort Reform. As a matter of historical familiarity, it has become, lately, nearly an axiomatic shibboleth, a parroted maxim, really, that a "premises" claim can always avoid the otherwise fatal statutory exclusivity of the Dramshop Act. Mann, however, is yet another intermediate Court of Appeals' decision, the latest of several recent cases on the subject, which allow the Alleged Intoxicated Person (the "A.I.P.") to avoid the Legislative Mandate of MCLA 436.22(11) by simply recategorizing the of the action as a Manuel-based "premises" case against a bar rather than as a "Dramshop" case.

By way of interesting legal history, it can be argued that the Michigan Legislature finally decided in 1986 to make a course correction in the law by legislatively superseding Manuel and returning the law to that previously held in Kangas v Suchorski, 372 Mich 396, 126 NW2d 803 (1964) which had held, following a long line of time-honored precedent, that the party who has been drinking cannot recover under the exclusive Dramshop Act as he or she is not regarded as "innocent". Manuel overruled Kangas as it previously held, "...that the liability provisions of the

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dramshop act not only preempt a common law action for 'negligence in failing to maintain a suitable place and safe conditions for business invitees'."

After thirty (30) years of safely unchallenged assumptions which do not account for the later Legislative pronouncements made in 1986, it is now time to scrutinize Manuel closely to see just how well that case actually holds up. In that case, the Michigan Supreme Court had validated the parallel existence of **both** "premises" and Dramshop claims devolving out of the same facts in suits against taverns, on grounds that the statute did not displace the common law. But that analysis, whatever its value, overlooks this result-changing legal observation: This duality recognized by the Manuel ruling was created in a legal climate which was in existence fifteen (15) years **before** the clear legal developments of reaffirmed unitary exclusivity and nonliability to the A.I.P. were enacted by Dramshop Tort Reform statutes in 1986.

In Manuel, it was held that a tavern's excessive sale of intoxicating liquor had been allegedly made to Carrigan, an unruly and boisterous customer. This sale of liquor created a liability on **both** "premises" and Dramshop grounds, it was held. Manuel held that the innocent customer[9], who had been beaten by Carrigan, could present two causes of action, not only the

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[9] The Court of Appeals' use of Manuel at 23a and 38a should not have been extended to the decidedly noninnocent Mr. Mann, we say.

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Dramshop Act, but, additionally, a "premises" theory for the breach of a common law duty by the bar to make the tavern safe for its customers as invitees. Thus, if Carrigan, the Alleged Intoxicated Person, had became drunk because of the illegal sale of liquor and had violently beaten the faultless plaintiff, then the Dramshop Act could furnish a remedy to a patron other than the A.I.P. on two (2) grounds, Dramshop and premises liability. Manuel held that the fact that the A.I.P. had been improperly sold too much alcohol could result in a secondary common law, premises liability recovery when the A.I.P. became violent on grounds that the proprietors had a duty to maintain safe premises for the patrons, as an accepted auxiliary claim.

Two observations fatal to a current use of Manuel must be noted here. First of all, Manuel did not allow the **alleged intoxicated party** to recover: only the innocent patron. Secondly, whatever value Manuel once had, however, it was probably statutorily overruled sub silentio by the 1986 passage of the Tort Reform Acts relating to Dramshop Act claims which statutorily preempted other common law theories by clearly stated exclusivity.

As a result, it is nevertheless time overdue to reexamine whether the exclusively of the Dramshop Act under former MCLA 436.22(11) and the nonliability of the "innocent party" rule of former MCLA 436.22(10) can be so easily sidestepped by the facile reconstituting of an alcohol-centered claim by simply morphing

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the liability claim from a "Dramshop" case into a re-labeled premises liability claim. Purportedly, because the inebriated patron should have been warned that it was wet and slippery outside, although he clearly already knew it and knew how to take care of himself, even in his allegedly intoxicated, diminished capacity, is the case one of "premises" or "Dramshop"?

We contend, clearly, the case should have been seen exclusively as a "Dramshop" matter. Under former MCLA 436.22(11) and (10), the prodigious drinking done by the A.I.P. would necessarily destroy his or her Dramshop claim. Here, however, the lower Panel created an augmented duty and heightened tort obligations on the part of the Speedboat to warn of bad weather to the A.I.P., who already knew the dangers of a Michigan snow storm and the necessary precautions; Plaintiff was thus fallaciously held entitled to greater due care because, horror of horrors, he has been drinking![10]

Worse yet, Judges Michael Kelly, Helene White and Kurtis Wilder have embraced a legal gimmick which actually **enhances** the premises liability claim against the Tavern, which could not otherwise be liable if the alcohol-related tort were held exclusively to be within the ambit of a Dramshop case.

This case is a stellar exemplar of why the public has very good reason to dislike tort lawyers. Roger Mann claimed to have

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[10] But not drinking to such a degree that he was insensate or falling down drunk: he still had use of his faculties. See Statement of Facts, ante.

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sat in a bar ingesting remarkable amounts of alcohol, but he had enough sense to decide that he was too intoxicated to drive (109a)(124a). Mann was still fully conversant with the awful weather conditions outside to protect himself. (116a). Mr. Mann still knew that things were getting icy and slippery; he also knew that they were potentially dangerous. Indeed, he had had a previous falling accident in the winter and still knew how to reduce the risk, and because he was feeling the effects of the alcohol and was sufficiently inebriated, in a "good mood" (114a - 115a), he now claims to be nevertheless entitled to damages otherwise outlawed because the alleged ingestion of alcohol has increased only **Defendant's** obligations to warn him of open and obvious dangers about which Mr. Mann already knew painfully well. That illogical, Bootstrapping Tautology is difficult to accept whole.

The Michigan Court of Appeals Opinion (20a), supported this dizzying argument against Mann's avoidance of fundamental personal responsibility and announced that the rule of law should be this curious holding:

> "The instant case is a premises liability action, and the conduct at issue is defendant's failure to take measures to reduce the risk of harm created by the condition of the parking lot. **Defendant's service of alcohol was implicated only as it related to defendant's knowledge of plaintiff's condition as relevant to whether defendant's conduct in failing to inspect or clear the parking lot and failing to warn plaintiff was reasonable. As such,**

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plaintiff's claim is not preempted by the Dramshop Act." (23a) (Emphasis Supplied.)

To be gentle about it, this is Statutory Cognitive Dissonance, at its worst, to reach a result. The purported sale and furnishing of intoxicants to Plaintiff, who, by definition, cannot be a "innocent party" under MCLA 436.22(10) as there is no cause of action whatsoever by statute for the Alleged Intoxicated Person, nevertheless alternatively caused Roger Mann to become less able to walk well on snowy ground which is a fundamentally obvious peril he swore on his oath that he already knew all about and knew how to remedy. Since Mann by his own testimony knew what precautions he had to take to walk on snow, **increasing** Defendant's responsibilities while **eliminating** Plaintiff's own due care obligations for an alcohol-related sale is new-wine-in-old-bottles, a Dramshop case at its chromosomal center, craftily reconstituted to look like a premises case to beat the lethal effects of MCLA 436.22 (10) and (11).

Let us repeat this subterfuge again, slowly. Accordingly to the Court of Appeals, except as it relates to **Defendant's** obligations, alcohol is **not** involved? As our brothers and sisters in the Upper Peninsula would so colorfully quip, "that dog will not hunt". Alcohol is, of course, at the **center** of Plaintiff's premises liability claim here. Really alcohol is its sine qua non; otherwise there would be no cause of action in the first place. To the extent that Manuel v Weitzman supra, and

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other premises liability cases can be said to avoid the exclusive remedy of the Dramshop Act, mandated under MCLA 436.22(11)[11] or the "innocent party" rule of nonliability mandated for the A.I.P. by MCLA 436.22(10), the law is, we submit, being tortured by the lower Courts to reach sympathetic (but illegal) results.

While Millross v Plum Hollow Golf Club, 429 Mich 178, 186, 413 NW2d 17 (1987) seems to have retained common law liability for "premises" claims, the case, upon closer examination, reveals that, in reality, Millross actually rejected the claim as an exempt "premises" case; Millross actually decided the law in favor of Defendant here. There, a claim was advanced that a golf club had a legal duty to provide alternative transportation for an employee who had become intoxicated by consuming drinks on the job during a banquet; the Supreme Court held that the thinly disguised "premises" theory was, in fact, preempted by the Dramshop Act exclusivity because alcohol was allegedly illegally served and could not be allowed to go the jury. Upon closer review, Millross actually supports the defense thesis here that when, as here, alcohol is at the center as to why there is a liability claim in the first place, then the Dramshop Act is the exclusive remedy and alternative alcohol-centered tort theories outside of the Dramshop Act are not allowed to provide other "creative" recoveries.

We respectfully submit that, nevertheless, there is work to

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[11] Now MCLA 436.1801(10).

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do with Millross. Millross rather sloppily excused Manuel v Weitzman on grounds that the negligent premises liability claim was not "predicated" on the furnishing or sale of intoxicating liquor; a reading of Manuel demonstrates that this is decidedly not so. This appeal presents a superb opportunity to fix that erroneous obiter dicta. Even if the Manuel "alcohol-predicate" for premises cases makes some peripheral sense when, say, a completely sober and innocent party wanders into a bar to have a soft drink, and then falls into a basement because a trap door has been left open by an intoxicated patron, that contention makes absolutely no sense when the culpable customer himself or herself is perched on a bar stool drinking as fast as he or she can, with both hands, for three (3) hours as Mr. Mann has admitted about **himself**. This distinction, again, also makes utterly no legal sense when the an ambidextrous drinker, "feeling good" but not rendered insensate, finally leaves to negotiate a parking lot he or she already fully well knows to be snowy and icy; he or she is hardly "innocent" under MCLA 436.10; that customer should come within the exclusivity of MCLA 436.11 if the claim is, as here, that the bar is liable for failing to warn an intoxicated patron of his or her own inability to walk on ice.

When the customer falls, it now has somehow become the **bar's** fault because of heightened warning and premises placed obligations on the bar, which rule also, conveniently, eliminates all concomitant responsibility of the drinking patron. A tort

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claim has been created here which is somehow found to be independent of the furnishing of alcohol; this claim exists because the Bar did not independently warn of snow and ice, risks and precautions of which were already known about. We strongly disagree because the only reason there is a "failure to warn" case is because Plaintiff said he was too intoxicated to heed the warnings.

What is really at issue here is the Court of Appeals' disdain for the "open and obvious danger" defense, sidestepped on grounds that the Plaintiff has voluntarily had too much to drink. To the extent that Manuel can be read to furnish the A.I.P. with an alcohol-centered premises claim to excuse the refusal/inability of the plaintiff to take care with respect to an "open and obvious danger", and we think that is clearly taking Manuel too far, then it is time to overrule that case, we say because MCLA 436.22(10) and (11) have made the exclusive cause of action unavailable for the A.I.P.

Truth to tell, there are frequent sins in giving the A.I.P. a Cause of Action for Dramshop which are still being committed in the name of Manuel. Consider, for example, Judge Neff's recent decision in Madejski v Kotmar Ltd., 246 Mich App 441, 633 NW2d 429 (2001) involving an under-aged nineteen year old exotic dancer at a strip nightclub who became intoxicated when she was given numerous drinks by the owners to loosen her inhibitions so that she would ply her skills as an ecdysiast more wantonly.

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Clearly, despite the fact that alcohol was at the very sine qua non core of the decedent's claim, the "innocent party" rule of former MCLA 436.22(10) and the MCLA 426.22(11) exclusive remedy of the Dramshop Act could be avoided, Judge Neff held in Madejski. Because the case was being litigated under the premises liability banner rather than under the Dramshop Act column, liability could thus be imposed by the easy change in nomenclature. Really now, is that all it takes to suspend relevant statutory prohibitions, cynically, just call them **something else**? Is the power of the Legislature to circumscribe what tort remedies are (and are not) allowed by law a mere cipher to be ignored by the linguistic gimmick of merely calling a Statutory Spade something altogether different, say, a Common Law Horticultural Utensil? We think not. Was this really a Dramshop Act action? Certainly, and we easily offer record proof: why else would Plaintiff put on an expert to testify to the degree of Mr Mann's "[visible] intoxication"? (128a - 171a).

The Trial Court made it clear in its pretrial rulings and in its jury charge that it was holding that this was **not** a Dramshop case at 50a - 56a; 172a - 174a. See, also, 182a - 186a. Nevertheless, using the not-too-subtle cloaking device of re-christening the Dramshop case as a reconstituted premises case, Plaintiff still attempted to try this alcohol-centered litigation as if it were an MCLA 436.22[12] a Dramshop case, without actually

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[12] Now MCLA 436.1801.

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calling it that. This was done by repeatedly hewing to the "visibly intoxicated" mantra of then-applicable Dramshop Act MCLA 436.22(4)[13]; Plaintiff did so successfully in both the Trial Court and before the Court of Appeals. It should not succeed here in the Court of Last Resort.

This was always a Dramshop case, purely and simply. Suggesting that Plaintiff must have been "visibly intoxicated" from testimony of Plaintiff's expert, Dr. Schneider (148a - 150a)(162a), but camouflaged in order to avoid the dramatically serious Dramshop legal problems which would otherwise attach, Plaintiff maneuvered about so that he could avoid the inherent problems with the Dramshop Act (as Plaintiff was barred as an A.I.P. [MCLA 436.22(10)] and the exclusivity of the Act [MCLA 436.22(11)], accomplished by creatively morphing this Dramshop case into a premises liability claim.

Furthermore, Plaintiff below attempted to neutralize the devastating defense of the "open and obvious" dangers of the blizzard, thereby frustrating the Riddle v. McLouth Steel Products Corp., 440 Mich 85, 485 NW2d 676 (1992) line of cases by imposing "failure to warn" obligations on Defendant because of Plaintiff's intoxication. Again, every facet of premises cases acknowledge the "open and obvious" defense, completely. Millikin v Walton Manor Mobile Home Park, Inc., 234 Mich App 490, 595 NW2d 152 (1999); Novotney v Burger King, 198 Mich App 470,

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[13] Now MCLA 436.1801(3).

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499 NW2d 379 (1993).

To effectuate this premises liability survival strategy, Plaintiff presented an expert, Dr. Schneider, who concluded that, after Mann's allegedly having voluntarily ingested so much alcohol, it was highly improbable that Roger Mann could "mask" the degree of his [otherwise visible] intoxication. (162a). This shows the deeply cynical degree of calling this "Dramshop" action a premises case. This claim of "visible intoxication", a term of art straight out of the Dramshop Act, allegedly imposed a duty on Defendant to warn the alcohol-impaired customer of the "open and obvious" dangers of the storm. But SJI2d 19.03 requires a warning to an invitee **only if the invitee will not discover the danger or will not protect himself against it.** Roger Mann knew all about the icy storm and the dangers, indisputably. Finally, what is a case involving "visible intoxication", if not a flat-out MCLA 436.22 Dramshop action?

There is a troublesome pattern beginning to surface here at the Intermediate Appellate Court level; it is significantly disturbing enough to warrant a clear Supreme Court decision. We think that the Court of Appeals has recently frequently **not** followed the philosophical lead of the Supreme Court in Jackson v PKM Corp,430 Mich 262, 422 NW2d 657 (1988), Laguire v Kain, Mich 367, 487 NW2d 389 (1992) and Millross as to similar ersatz-style "premises" cases. Madejski is one such example. Mann is another. Because this Court has clearly previously held in

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Jackson, Laquire and Millross that the Dramshop Act is the exclusive remedy when, as here, the cases which involve, as a central legal predicate, the drinking of alcohol beverages, this makes virtually all of these cases Dramshop Act actions, particularly when the A.I.P. is suing on behalf of **himself or herself**. Irrespective of whether the legal theory for the cause of action is called a Spade under statute or whether it is masquerading under the Horticultural Utensil logo under Common Law, it is, at bottom, a Dramshop case and should be formally treated as such by the application of the dispositive statute Bench and Bar are ordained to follow.

Should plaintiffs be able to fluidly avoid the "innocent party" statute creating nonliability [MCLA 436.22(10)] or the exclusivity of statutory remedy [MCLA 436.22(11)] simply by the use of a clever rhetorical alternative by calling the claim a premises cause of action something other than what it really is, i.e., a Dramshop Act action? This Court clearly does not think so as it has often refused to safeguard restyled "Premises Cases" from the rigors of MCLA 436.22 when the plaintiffs' cause of action is, really, after all, a Walks-And-Talks-Like-A-Dramshop-Act cause of action. See, for example, Jackson v PKM Corp., 430 Mich 262, 422 NW2d 657 (1980); Laquire v Kain, 440 Mich 367, 487 NW2d 389 (1992).

Because Millross contains some troublesome language added unnecessarily (see 429 Mich at 186), this is a timely opportunity

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to clean up the Law. When linguistic push comes to pragmatic shove, a premises liability claim which fundamentally relates to whether or not intoxicating beverages were improperly served is, at its core, a Dramshop Act action.

Does Manuel v Weitzman, having any continuing validity? Decided in 1971, Manuel it did not have the benefit of the now-clear legislative mandate as to construe as exclusive those alcohol-predicated causes of action which the Legislature outlined pursuant to the later 1986 Tort Reform Acts. Manuel did **not** have the later legislative mandate to outlaw claims for the A.I.P. himself; indeed the claim was by the innocent customer, **not** the A.I.P., in Manuel. Manuel, furthermore, has proven to be the excuse for certain recent panels of the Michigan Court of Appeals to circumvent the legislative mandate of the Dramshop Act. Certain intermediate Panels are clearly construing core-central issues regarding the sale, furnishing or giving away of intoxicating beverages as a simple Dramshop alternative if called a premises liability Claim. See Madjewski and Mann.

Heretofore, the Supreme Court has ruled that the parties drinking could not be regarded as "innocent" because alternative legal premises-style theories have been creatively suggested. Jackson v PKM Corp., 430 Mich 262, 422 NW2d 657 (1988); Laguire v Kain, 440 Mich 367, 487 NW2d 389 (1992). Whose opinion should control, then, the Michigan Supreme Court in conceptual theory or the Court of Appeals' defiant Judicial Nullification in actual

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practice? We suggest that the views of the Court of Last Resort of our State should be those that govern.

We say with confidence that the instant decision of the Michigan Court of Appeals here is plainly contrary to the intellectual thrust and core holdings of what Millross, Jackson and Laguire actually have decided about the Dramshop Act being the Exclusive Remedy for alcohol-related torts against taverns. Creative lawyering/judging notwithstanding to get around these otherwise clearly stated statutory mandates, alternative sobriquets or after forms of clever nomenclature designed to make Dramshop cases "premises liability" cases so as to fit under the Manuel exception aside, it is time to put Manuel down. "Exclusive" means all cases against taverns must be tried under MCLA 436.22 and/or MCLA 436.1801 if they are based on an intoxication predicate. The Supreme Court of Michigan should so declare in no uncertain terms.

For these reasons[14], Defendant and Appellant Speedboat Bar respectfully requests that this Court reverse the two (2) Opinions of the Michigan Court of Appeals found at (20a) and (35a) of the Appendix and grant Judgment Notwithstanding Verdict On Appeal.

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[14] Because MCLA 436.22(11) and (10) make the Dramshop Act the exclusive remedy for Roger Mann - one which completely bars his cause of action as A.I.P. as a matter of law, Judgment Notwithstanding the Verdict is wholly appropriate here.

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II.

IN ICE AND SNOW SLIP AND FALL CASES, SJI2d 19.03 AND 19.05 ARE INHERENTLY INCONSISTENT. PLAINTIFF HERE ADMITTED THAT HE KNEW ALL ABOUT THE BLIZZARD CONDITIONS ON THE DAY OF THE ACCIDENT AND WAS AWARE OF ALL THE PRECAUTIONS THAT HE HAD TO TAKE. SUCH "OPEN AND OBVIOUS" CONDITIONS RENDER PARALLEL USE OF MUTUALLY EXCLUSIVE SJI2d 19.03 AND 19.05 ERROR.

Both Judge Finch of the Wayne County Circuit Court and the Michigan Court of Appeals Panel of Judges Michael Kelly, Helene White and Kurt Wilder expressed strong views that, notwithstanding the Note on Use to then-applicable SJI2d 19.05[15] that that charge was to be used in ice and snow premises cases rather than the "more general" then-applicable SJI2d 19.03[16] instruction, both jury charges would nevertheless be utilized in this trial.

There is an inherent tension, we submit, between premises liability cases pertaining to ice and snow accumulation under former SJI2d 19.05 and those which relate to other defective premises situations under former SJI2d 19.03 in which "an open and obvious" danger is present: More accurately, and more clearly at issue here, is the failure to warn as to an otherwise obvious danger. The trial court erred in utilizing SJI2d 19.05 and 19.03 (172a - 173a) together because of their inherent. By virtue of the Note on Use to SJI2d 19.05, they are, in fact, mutually exclusive.

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15 Now M CIV JI 19.05.

16 Now M CIV JI 19.03.

SJI2d 19.03 is the general premises liability rule and it states:

> "SJI2d 19.03 Duty of Possessor of Land, Premises, or Place of Business to Invitee
>
> A possessor of [land/premises/a place of business] has a duty to maintain the [land/premises/place of business] in a reasonably safe condition.
>
> A possessor has a duty to exercise ordinary care to protect an invitee from unreasonable risks of injury that were known to the possessor or that should have been known in the exercise of ordinary care.
>
> ***(A possessor must warn the invitee of dangers that are known or that should have been known to the possessor unless those dangers are open and obvious. However, a possessor must warn an invitee of an open and obvious danger if the possessor should expect that an invitee will not discover the danger or will not protect [himself/herself] against it.**
>
> **(A possessor has a duty to inspect [land/premises/a place of business] to discover possible dangerous conditions of which the possessor does not know if a reasonable person would have inspected under the circumstances.)
>
> **Note on Use**
>
> ***** This paragraph is to be used in cases involving a claim of failure to warn.**
>
> ** This paragraph is to be used in cases involving a claim of failure to inspect.
>
> This instruction should be accompanied by the definition of negligence in SJI2d 10.02." (Emphasis supplied).

This Jury Instruction is found in its manual textual form in our Appendix at 179a.

Consider, furthermore, what SJI2d 19.05 and its Note On Use say as to premises cases involving ice and snow:

> "SJI2d 19.05 Duty of Possessor of Land, Premises, or Place of Business to a Business Invitee Regarding the Natural Accumulation of

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Ice and Snow

It was the duty of _____ to take
name of defendant
reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to _____.
name of plaintiff

Note on Use

This instruction should be used where applicable instead of the more general SJI2d 19.03 Duty of Possessor of Land, Premises, or Place of Business to Invitee. It does not apply to public sidewalks." (Emphasis supplied)

SJI2d 19.05 in manual form is also found in our Appendix at 181a.

Again, here, Roger Mann was allegedly voluntarily perched on a bar stool drinking heavily for three (3) hours of watching a major blizzard develop outside his bar picture window. He knew all about the weather. Having worked outside for thirty-eight (38) years, Roger Mann knew how to take care of himself in a Michigan winter and, indeed, had previously fallen to an injury in 1992 because of ice and snow conditions while drinking. Because Mr. Mann knew of the icy dangers outside and knew how to take care of himself. There is, we submit, nothing to which SJI2d 19.03 could have related to by way of obligatory warnings.

What, exactly, was the warning that Defendant was supposed to give the person becoming voluntarily intoxicated about the patently obvious weather conditions? And, absent the Speedboat's carrying Mr. Mann to his "safe" ride in a sedan chair, what were

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we supposed to do to help him reduce a risk he already claimed to know how to reduce?

Roger Mann fully confessed in this record that he knew all about the weather conditions and knew how to take care of himself. His 1992 fall was on ice while drinking. All that truly remained, perhaps for the jury to decide was whether or not Defendant had an obligation to remove the ice and snow in the middle of the blizzard because that is the only remaining tenet of SJI2d 19.05. The only question which should have been tried to this jury is whether or not Defendant had a reasonable obligation of snow removal or other "due care" snow safety precautions such as salting; it is, however, patently ridiculous to place an onerously silly, duplicative requirement upon a business to tell patrons sitting in front of a picture window to be careful of the ice and snow falling under blizzard conditions which they already know all about, anyway, and as to which they know how to protect themselves.

There is an inherent tension between SJI2d 19.03 and 19.05 and no reported Court of Appeals case or Michigan Supreme Court case exists to resolve that tension. There have been attempts to blur that clear dichotomy by reference to Quinlivan v Great Atlantic & Pacific Tea Co., 395 Mich 244, 235 NW2d 732 (1975) which should be corrected on Full Calendar decision by a clarifying reversal.

Quinlivan's statement, found at 395 Mich at 261, that the

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obvious dangers of ice and snow in Michigan during the winter do not relieve premises owners from reasonable attempts to alleviate the otherwise "obvious" danger of walking on ice and snow has been vastly misunderstood. Quinlivan is **not**, and never as been, a Warnings Case. It is a case creating a duty upon landowners and premises possessors to **remove** the ice and snow; there is nothing we find in that case found at 395 Mich at 261 which in any way indicates that there is an additional duty to warn invitees about unpleasant weather, something which whips every Michigander in the face ubiquitously from the middle of November until the middle of April. The possibility of slippery ice and snow on the sidewalk in March is a fact of life for everyone in our Beautiful Peninsula and everyone knows how to deal with it.

This is why the Note on Use in SJI2d 19.05 makes so much sense. Ice and snow cases are **never** "duty to warn" cases because every competent, sentient human being who did not drop deus ex machina from Jamaica must know of the dangers of walking on ice and snow in Michigan in winter and what to do to reduce the perils. What Quinlivan was attempting to do was to eliminate the "natural accumulation" rule of nonliability by posing the potential tort duty of ice and snow **removal**. There is no duty to warn we see out of that case.

With the possible exception of the case of Beals v. Walker, 416 Mich 469, 331 NW2d 700 (1982), there is no Michigan case law to support the principle that a premises owner has a duty to warn

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invitees of alleged risks associated with natural accumulations of ice and snow, in addition to the duty to take reasonable measures within a reasonable period of time after the accumulation to diminish the hazard of injury to business invitees by snow removal. The case of Quinlivan v. Great Atlantic and Pacific Tea Company, 395 Mich 244, 235 NW2d 732 (1975) certainly did not recognize an independent duty to warn. Rather, in Quinlivan, the central issue was whether or not the premises owner had a duty to take reasonable measures within a reasonable time after the accumulation of ice and snow to diminish the hazard of injury to invitees. In that case, there was no claim that the premises owner also had a duty to warn, nor did the Michigan Supreme Court impose such a duty.

As this Court is aware, however, there is, indeed, odd language in Beals v. Walker, supra, which would suggest that there can be a duty to warn in addition to the duty to take reasonable measures to reduce the risk. We contend, however, that to the extent that Beals recognizes a duty to warn, in addition to the duty to reduce the risk, Beals is no longer good law. This aspect of the Beals opinion is based upon the pre-Riddle, now-defunct principle that an individual can have a duty to warn despite the otherwise open and obvious nature of the hazard. The acceptance by the Beals Court of this now rejected warnings principle is demonstrated in the following quote from the Beals opinion:

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> The Court of Appeals majority reasoned that 'to the extent that the icy condition was obvious, due to the temperature, climate, and time of year, Defendant cannot be held to have a duty to warn Plaintiff of such a condition.' ... This conclusion is directly contrary to this Court's decision in Quinlivan v. Great Atlantic and Pacific Tea Company, Inc., 395 Mich 244, 235 NW2d 732 (1975).
> Beals v. Walker, supra, at 480.

As is demonstrated by the foregoing quote, the Beals Michigan Supreme Court may have misapplied the earlier decision in Quinlivan. Contrary to what the Court later suggested in Beals, the Quinlivan opinion does not impose a duty to warn, and certainly did not impose a duty to warn of open and obvious conditions such as natural accumulations of ice and snow. Just as importantly, however, any notion that there is a duty to warn of open and obvious hazards was gradually eroded during the years which followed issuance of the Beals decision, until it is now completely inaccurate statement of Michigan law.

This legal erosion is clearly demonstrated by the Supreme Court's decision in Riddle v. McLouth Steel Products Corp., 440 Mich 85, 485 NW2d 676 (1992). In that case, the Supreme Court unequivocally held that there is no duty to warn of open and obvious dangers. Riddle v. McLouth Steel, supra, at 99-100. The Appellate Courts of this State have also reaffirmed that "open and obvious danger" doctrine is applicable to premises liability actions. Millikin v Walton Manor Mobile Home Park, Inc., 234 Mich App 490, 595 NW2d 152 (1999); Novotney v Burger King, 198

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Mich App 470, 499 NW2d 379 (1993).

In light of these principles, it is now quite apparent that the 1982 Beals decision should be partially declared to be good law no longer. To the extent that Beals can be read to suggest that there can somehow be a duty to warn a longstanding resident of Michigan of snowy and icy conditions as open and obvious dangers, the alleged failure to warn is totally superfluous. Right from the outset, this principle was based on a very questionable foundation, and should now be fully rejected by the Michigan Supreme Court in light of Riddle and it progeny.

In short, there is absolutely no basis in Michigan case law to impose a duty to warn, in addition to a duty to take reasonable precautions with regard to natural accumulations of ice and snow, the "Note on Use" which follows SJI2d 19.05 is therefore a completely accurate statement of Michigan law, when its states that SJI2d 19.05 should be used "instead of" the more general SJI2d 19.03. This is made even more acute by virtue of the very language of SJI2d 19.03 itself which requires warnings only if the invitee cannot discover the danger or will take action to protect himself.

Where unlawful, confusing, erroneous, contradictory or conflicting instructions are given to a jury on a material issue, the instructions are deemed inherently defective and the jury charge constitutes error requiring reversal. Kirby v. Larson, 400 Mich 585, 606-607, 256 NW2d 400 (1977); Sudul v. City of

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Hamtramck, 221 Mich App 455, 480-481, 562 NW2d 478 (1997); Scalabrino v. Grand Trunk Railway Co., 135 Mich App 758, 766, 356 NW2d 258 (1984); Getman v. Mathews, 125 Mich App 245, 247-248, 335 NW2d 671 (1983). In the instant case, the instructions given to the jury were fundamentally confusing and contradictory. Just as importantly, there is no way that it can be said, on the record of this matter, that these erroneous and contradictory instructions did not give rise to the verdict against the Defendant. These contradictory instructions, mutually exclusive by virtue of the SJI2d 19.05 Note on Use, directly pertained to the issue of negligence, i.e., the nature of the Defendants' duty to the Plaintiff.

In the absence of a complete and accurate statement of the law pertaining this issue, it simply cannot be said with any degree of assurance that the subject jury properly understood the law in this area, and based its verdict on proper understanding of the law. Without proper instructions regarding the law in this area, the jury was essentially left chartless. This resulted in a severe injustice to Defendant, which was entitled to have this matter resolved based upon the law of Michigan. Under the circumstances, the only way to remedy this injustice is to afford Defendant the requested relief of a completely new trial, if Judgment Notwithstanding The Verdict is deemed to be too harsh a remedy and is not granted in Argument I.

It is respectfully submitted that the jury verdict and

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resultant Judgment should be reversed so that there is no additional confusion by the Bench and Bar that Quinlivan, 395 Mich at 261 creates a "duty to warn" in ice and snow accumulation premises liability cases. There is no duty to warn anyone of a Michigan blizzard howling by a picture window. By its very terms, the duty to warn springs from SJI2d 19.03 only when, **"...an invitee will not discover the danger....".**

Does Beals v Walker, supra have any validity in light of Riddle v McLouth Steel? Probably not. But Beals is still on the books and it is still capable of being misinterpreted as the Mann Opinion amply demonstrates. This is the chance the Supreme Court needs to correct Beals in light of Riddle and SJI2d 19.05.

Are Courts refusing to focus exclusivity on SJI2d 19.05 in ice and snow premises cases, incorrectly so? Obviously, the answer to that is, "yes" as the Court of Appeals in Mann has utterly refused to apply Riddle effectively to negate and avoid SJI2d 19.03 in favor of the patently applicable (see the Note on Use) SJI2d 19.05.

As such, a massively confusing set of redundantly unnecessary and inconsistent jury instructions was given to this jury. There is, we submit, an inherent tension between SJI2d 19.05 and SJI2d 19.03, particularly in ice and snow cases which are, at once, open and obvious to the invitee/licensee as soon as they open the door, or ascend the steps, or in the case of Beals v Walker, get on the slippery roof.

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The response of Judges Michael Kelly, Helene White and Kurt Wilder to this is that this Court stated in Bertrand v Allen Ford, Inc., 449 Mich 606, 611-612, 537 NW2d 185 (1985) that an invitor may be required to warn an invitee of even an open and obvious danger if the invitor has reason to know that the invitee may be unable to protect himself from such danger. Assuming that being very intoxicated and a drug-induced, voluntary diminished capacity are such protected enclaves, in this case, the repeatedly conceded testimony of Roger Mann was that he was in full charge of his faculties, that he knew all about the snowy conditions outside the Speedboat Bar and knew all he had to do to take care of himself, including walking slowly and deliberately which was the testimony as he exited the building. How in the name of Proximate Causation, can those admitted deadly facts be ignored?

Again, the real problem here is that the Trial Court and the Intermediate Appellate Court have transmogrified a basic Dramshop Act action into a steroid-enhanced, premises liability duty to warn action, otherwise squarely preempted by the Dramshop Law. There is (or should be) no duty to warn a fellow like Roger Mann who has sat on a bar stool in front of a picture window drinking "doubles" long enough to own it by Adverse Possession that he should walk carefully outside because the blizzard - which he can see - is making things slippery, when he admits he already knew and was otherwise sufficiently aware of his own due care

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obligations because of his drinking and the weather to get a "safe ride" with someone else.

Is it appropriate for the Supreme Court at this time to correct Quinlivan, supra at 261? We think that it is. Is it time for this Court to overrule whatever is left of Beals v Walker, supra in light of Riddle and SJI2d 19.05? We think that it is. Is it time for the Supreme Court to specify exactly under what conditions, relating to ice and snow liability, that SJI2d 19.05 is to be exclusively used? We think that it is. Is it legal error, sufficient to reverse the case, if inconsistent SJI2d 19.05 and 19.03 are read to the jury together? We think that it is such prejudicial error.

With much confidence, Defendant-Appellant Speedboat Bar states that the Trial Court and the Appellate Court should be reversed for these a priori legal errors. Because MCLA 436.22(11) and (10) completely bar the A.I.P. from any recovery as a matter of statutory exclusivity, we believe that a Judgment Notwithstanding The Verdict should be granted as we requested in Argument I. In the alternative, we request that a new trial as to all parties and all issues be ordered on remand to the Wayne County Circuit Court because of the inconsistent use of SJI2d 19.03 and 19.05.

III.

THE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE VOLUNTARY INTOXICATION OF PLAINTIFF WAS WHOLLY AUTHORIZED BY SJI2d 13.02. THE TRIAL COURT'S USE OF SJI2d 13.02 and 19.03 WAS INHERENTLY INCONSISTENT WITH THE ALLEGED FAILURE TO WARN THESIS PRESENTED BY SJI2d 19.03. THE USE OF SJI2d 19.03 EFFECTIVELY NEGATED FORMER MCLA 436.22(10) WHICH MAKES A DRAMSHOP ACT CASE THE EXCLUSIVE REMEDY FOR MONEY DAMAGES AGAINST A TAVERN. GIVEN THIS INCONSISTENCY IN THE JURY INSTRUCTIONS, A NEW TRIAL MUST BE ORDERED.

On December 11, 2002, this Court Granted Leave to Appeal in this case. That Order is found in our Appendix as (1a). The December 11, 2002 Order of the Supreme Court stated in pertinent part:

> "The parties are directed to address the possibility that the giving of SJI2d 13.02 was contradicted by additionally giving SJI2d 19.03 and, if so, whether that effectively violated former MCL 436.22(1) [sic; MCL 436.22(10)] which made an action under the dramshop statute, the 'exclusive remedy for money damages against the licensee arising out of the selling, giving or furnishing of alcoholic liquor'". (1a)

We begin to respond by quoting the language of SJI2d 13.02 (now, M Civ JI 13.02) entitled "Intoxication As Affecting Negligence". SJI2d 13.02 reads as follows:

> "It has been claimed that _____ had been drinking _____. According to the law, one who voluntarily impairs his or her abilities by drinking is held to the same standard of care as a person whose abilities have not been impaired by drinking. It is for you to decide whether _____'s conduct was, in fact, affected by drinking and whether, as a result [he/she] failed to exercise the care of a reasonably careful person under the circumstances which you find existed in this case."

(174a; 178a)

At the request of the Speedboat Bar, this instruction was given to the jury over Plaintiff's objection. Given the facts of the case, detailed in our Statement of Facts, it is not disputed but that Roger Mann spent a substantial portion of the afternoon before his fall drinking very heavily. Unquestionably, the Law of Premises clearly stated in SJI2d 13.02 provided Defendant with a defense in that, according to the law, one who voluntarily impairs his or her ability by drinking is held to the same standard of care as that person whose abilities have not been impaired by drinking. It would have been a jury question, in any event, for the trier of fact to decide whether Roger Mann's conduct was, in fact, affected by his drinking and whether, as a result of that drinking, he failed to exercise the care of a reasonably careful person under the circumstances. SJI2d 13.02.

By utilizing SJI2d 19.03 (now M Civ JI 19.03) (172a - 174a) the Trial Court elevated this premises case so as to eliminate the legal effects of voluntary intoxication by Roger Mann which were inconsistently placed upon him by SJI2d 13.02. From the very terms of SJI2d 19.03, it becomes clear that that jury charge should not have been given in the first place because it was, in all respects, factually inapposite and fatally at odds with SJI2d 13.02. In part, SJI2d 19.03 states:

> "A possessor must warn the invitee of dangers that are known or that should have been known to the possessor unless those dangers are open and obvious. However, a possessor must warn an invitee of an open

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and obvious danger **if the possessor should expect that an invitee will not discover the danger or will not protect [himself] against it.**" (Emphasis supplied)

Given the severity of the Michigan Blizzard on that March day, the snowy and icy conditions were (or should have been) "open and obvious" to Roger Mann, no matter how much he had to drink. However, should Roger Mann have been warned by the tavern as an invitee to this otherwise open and obvious danger, since he was drinking? Certainly not, at least under these facts. Under SJI2d 13.02, he was held to the standard of the sober.

It would be an unreasonable conclusion to make that the Speedboat Bar should have expected that Roger Mann would not have discovered the danger easily seen out of the picture window or would not have protected himself against it since (a) he was sitting in his seat at the Bar, near the open picture window, for three (3) hours, watching the howling snowstorm and (b) as Mann himself cheerfully testified, he had lived in Michigan all of his life, had had a previous fall, and knew that he had to take precautions to keep himself from falling on ice and snow (107a), notwithstanding his drinking of nine (9) drinks in three (3) hours. And if Roger Mann was falling down, insensate from his drinking he cannot recover as the tort claim available to the A.I.P. is exclusive to the Dramshop Act and is barred as a matter of public policy under MCLA 436.22(11) and (10).

It is difficult to apprehend any clear rationale which would justify the use of wholly inconsistent SJI2d 19.03 under these

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circumstances.

It is not, however, difficult to apprehend why SJI2d 13.02 was properly and correctly given to the jury in this case. When the facts indicate voluntary intoxication, advising the jury that the plaintiff who imbibes is to be held to the same standard as the sober, lest plaintiff's altered state, as here, actually **benefit** the plaintiff by virtue of his or her voluntarily diminished capacity. As was held in Murphy v Muskegon County, 162 Mich App 609, 618, 413 NW2d 73 (1987), when there is ample testimony indicating that the plaintiff may have been intoxicated, it is appropriate for the trial court to issue this intoxication instruction to charge the jury fully.

The Court of Appeals' decision in this case was logically odd, to say the least. The Slip Opinion made this curious holding, (23a):

> "The instant case is a premises liability action, and the conduct at issue is defendant's failure to take measures to reduce the risk of harm created by the condition of the parking lot. Defendant's service of alcohol was implicated only as it related to defendant's knowledge of plaintiff's condition as relevant to whether defendant's conduct in failing to inspect or clear the parking lot and failing to warn plaintiff was reasonable. As such, plaintiff's claim is not preempted by the Dramshop Act."

This does not square with SJI2d 13.02. In short, because of Plaintiff's voluntarily inebriated condition, Defendant's responsibilities were **increased**, while Plaintiff's diminished capacity caused his responsibilities for his own due care would be **decreased**. This is a strained interpretation of Michigan Law

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which holds Mr. Mann to the same perceptions and knowledge of the sober.

According to the Court of Appeals, despite the clearly stated legal rule found in SJI2d 13.02, i.e., that a person who is voluntarily intoxicated is held to the same standard of conduct for his or her own due care as are other persons who are not intoxicated. The Mann Court of Appeals has turned the law on its head to find that **increased** premises duties are posited on the tavern owner to take especial care of an intoxicated patron when the patron's duties are irrationally **decreased,** despite the rule announced by SJI2d 13.02. These duties predominantly relate to the obligation to warn the invitee, who is intoxicated, of dangers that he or she already know about and as to which they are fully conversant with methods to protect themselves, even if drinking.

Should this **increased** duty to warn the overly indulgent patron create an alternative Cause of Action, whose Cause of Action does not exist if a formal Dramshop Act action as principal claim is brought? Put another way, can the alcohol-centered creation of a Cause of Action based upon **increased** duties of the bar to warn patrons who have been drinking so that their responsibilities are **decreased**, constitute a Premises Claim or is it really, after all, simply a Dramshop Act action at its core masquerading as a Cause of Action prohibited explicitly by MCLA 436.22 (10) and MCLA 436.22 (11). As a matter of Michigan

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Legislative policy, the Alleged Intoxicated Person cannot obtain damages by virtue of his or her having drunk alcohol because of the legislative codification of the "innocent party" rule as stated by former MCLA 436.22 (10) which bars all such claims. Because the Cause of Action for **all** such claims are **exclusively** preempted by former MCLA 436.22 (11), the use of the portion of the Standard Jury Instruction SJI2d 19.03 relating to the alleged failure to warn obviously conflicts with the exclusivity of the Dramshop Act. This is so because, at bottom, alcohol is at the very center of whether the Cause of Action exists or not in the first place. If the Cause of Action exists to benefit an otherwise barred Alleged Intoxicated Person like Roger Mann, then, in that eventuality, the dynamism of the Legislature in making the Dramshop Act an exclusive remedy is frustrated by plaintiffs' simply repackaging the claim so that the claim is brandished as a premises claim and not as a Dramshop Act action.

The Supreme Court has previously held that MCLA 436.22(11) [now MCLA 436.1801(10)] precludes any common law action, however denominated, arising out of the sale or furnishing of alcohol which renders the tavern liable to the Alleged Intoxicated Person. Jackson v PKM Corp., 430 Mich 262, 422 NW2d 657 (1988).

The nomenclature does not matter. It matters not how cleverly the "new" Cause of Action is repackaged: whether it is a Gross Negligence Claim, Jackson v PKM Corp., supra, failing to provide adequate and safe transportation home to an employee who

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became intoxicated at an employer-sponsored dinner, Millross v Plum Hollow Golf Club, 429 Mich 178, 413 NW2d 17 (1987), or even an action for contribution which has been held barred by the exclusivity provision, Hatten v Consolidated Rail Corp., 860 FSupp. 1252 (DC Mich 1994), all alcohol-related claims are tested by the Act.

Consider LaGuire v Kain, 440 Mich 367, 487 NW2d 389 (1992) in which the Michigan Supreme Court held that the Dramshop Act prohibited a minor from recovering damages because, from the clear terms of the Act, a minor (or, we submit, the Alleged Intoxicated Person) is clearly not an individual who is entitled to sue by virtue of the very terms of the Act itself under MCLA 436.22(10) and (11). The same rationale applies here as in LaGuire. The "visibly intoxicated person" called for by MCLA 436.22 to subject the Speedboat to liability has to be someone **other than** the A.I.P. or the minor himself or herself. MCLA 436.22(5). While a husband, wife, child, parent, guardian, "or other person" who has been injured by a visibly intoxicated person certainly can sue, by the very strength of the terms in the Statute, the visibly intoxicated person himself or herself is not such a person who is granted a Cause of Action under this otherwise **exclusive** method of handling alcohol-related tort claims as a matter of legislative choice and Public Policy. See MCLA 436.22(10) and (11).

Historically, since the time of Brooks v Cook, 44 Mich 617, 618-619, 7 NW 216 (1880), it has been clear that the Legislature

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could have construed "other person" to have meant the intoxicated person if there had been a clear expression of this intention, distinctly and unequivocally by clear language to such effect, which there is not.

Myriad changes and amendments to the Act have taken place since 1880, but the Legislature has repeatedly refused to extend the exclusive Dramshop Act to create a Cause of Action in favor of the intoxicated person himself or herself. LaGuire, supra.

As LaGuire points out, given the exclusivity of the Dramshop Act, given the unavailability of the Act to benefit the Alleged Intoxicated Person or the Minor who is intoxicated, there is no tort claim allowed at law by virtue of any imbibing person pursuant to MCLA 436.22 as formerly constituted and MCLA 436.1801 as presently constituted.

What does all of this mean for our case, especially for SJI2d 13.02? It means that removing legal obligations because Mr. Mann was drinking is at complete odds with SJI2d 13.02.

Former MCLA 436.22(11) makes the Dramshop Act the "exclusive remedy for money damages against the licensee arising out of the selling, giving or furnishing of alcoholic liquor". To the extent that Plaintiff has creatively utilized the Failure to Warn provisions of a premises-based SJI2d 19.03 claim to fashion an existent Cause of Action which otherwise would not exist, MCLA 436.22(11) is clearly violated. SJI2d 13.02 should **not** be withheld from the tavern faced with a premises claim. Patently, SJI2d 19.03 pertains to **generalized** premises cases, not to Slip

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and Fall cases due to natural accumulations of ice and snow, as the Note on Use to SJI2d 19.05 clearly states.

To exalt diminished capacity so as to create a "sideways" Premises Liability Claim which circumvents the exclusivity of the Dramshop Act Law is a circumlocution which does violence to what SJI2d 13.02 is supposed to accomplish: hold intoxicated people to the same level of knowledge, perceptions and due care as other persons who have not voluntarily imbibed. The Mann Court of Appeals has now elevated the somewhat lugubrious and excessive use of intoxicants to be a real legal benefit as there are now **heightened** legal duties for tavern owners and **decreased** due care duties for tavern customers, notwithstanding the exclusivity of the Dramshop Act. This SJI2d 13.02 - negating circumlocution, which is at the heart of Plaintiff's case, requires a clear condemnatory statement from the Michigan Supreme Court in reversing this case.

Our Supreme Court should grant Judgment Notwithstanding the Verdict in recognition of the intertwined effects of MCLA 436.22(11) and (10) and SJI2d 13.02. To the extent that issues of fact may still remain as to whether Defendant-Appellant Speedboat had an obligation to remove the ice and snow and the inherent factual question as to whether it was reasonable for the Speedboat to do so before the snowstorm ended, and in the event that Judgment Notwithstanding the Verdict is deemed to harsh a remedy by the Supreme Court, then a New Trial as to All Parties and All Issues must certainly obtain. Certainly, there should be

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no retreat from what SJI2d 13.02 was intended to do simply because a tavern is involved.

For these reasons, Defendant-Appellant Speedboat believes that a New Trial as to All Parties and All Issues must be ordered.

RELIEF SOUGHT

WHEREFORE, Defendant-Appellant SHUSTERIC ENTERPRISES, INC., d/b/a/ SPEEDBOAT BAR & GRILL prays that the decisions of the Trial Court and the intermediate Appellate Court be reversed, Judgment Notwithstanding the Verdict be granted on appeal, or in the alternative, that a full new trial as to all parties and all issues be ordered, together with all taxable costs allowed by law.

Respectfully submitted,

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